Dear Law Reform Committee,

Introduction

The Children’s Legal Service, Legal Aid NSW refers to the Terms of Reference paper ("The Paper") referred to the Victorian Law Reform Commission by the Victorian Legislative Assembly on the ‘Inquiry into Sexting’.

The Children’s Legal Service ("CLS"), Legal Aid NSW, provides advice and representation to children charged with criminal offences in NSW.

(1) The incidence, prevalence and nature of sexting in Victoria

CLS is not in a position to comment on the incidence, prevalence and nature of sexting in Victoria. However, we can confirm that we have received inquiries regarding sexting on the Legal Aid Youth Hotline. We also note the case of DPP v Eades [2009] NSWSC 1352, in which an 18 year old incited a 13 year old girl to take a nude image of herself and send it by mobile phone to him as a NSW case illustrating the current issues faced in the regulation of sexting behaviour.

Statistics on the incidence, prevalence and nature of sexting are currently limited and lacking in authority. We understand that the Sydney Institute of Criminology, University of Sydney, is in the process of gathering more definitive data on the incidence of sexting in NSW, which may be of interest to the Committee. But aside from this resource, we note that official data on sexting is sparse.

We also raise a number of points regarding the role of discretion in gathering data and measuring the incidence of sexting that may be applicable to Victoria. The role of discretion in the reporting, investigating, prosecuting and conviction of children in the area of sexting cannot be understated, especially in consideration of the breadth of the applicable child pornography laws. The number of sexting instances that may come to official attention must, by any count, constitute a small fraction of the overall number of sexts sent. Children and teenagers who sext consensually are likely unaware of the potential for criminal prosecution, and in any case considering the consensual nature of sexting,
their acts, may have no reason for reporting the activity. Even in the situation where a sext is misused, a teenager may not report it because they feel “not altogether blameless or wishes certain activities to remain secret”. It is unlikely a child who feels shamed or embarrassed by an image will draw it to the attention of adults, as this may simply increase such shame and embarrassment. Further, even if the child is aware of the role of the criminal law in this area, this may itself act as a disincentive to reporting for fear of criminalisation.

Similar discretionary considerations apply even when we consider the role of adults to whose attention sexting behaviour has been drawn. They may view the practice as part of childhood explorations of sexuality, and be unlikely to condemn it unless there is evidence of abuse or exploitation. Similarly, many adults may disagree with the criminal status of the act, and see a more conciliatory reaction or ‘talking to’ as a more appropriate way of dealing with the act. It must be noted however that these considerations may not always apply. Adults may report the behaviour to officials not knowing the criminal consequences may apply to their own child, not just the other party involved. They may also purposefully draw the attention of officials to the act if they disapprove of a teenage relationship, not knowing the law applies equally to their own child. Further, reporting may also occur when they believe the act to have lacked consent or involved coercion, when this is not the case. Lastly, there are mandatory requirements for teachers and those involved with children, which may compel an adult in this position to report the behaviour.

Once drawn to official attention, there is no guarantee a prosecution may be pursued. Evidence from the US suggests police are using discretion not to prosecute unless there are other factors which are less readily assigned to childhood experimentation with sexuality. Factors include whether the image was distributed without consent and whether the image was of a criminal offence. Further US research shows arrests were made in 18% of cases where the ‘sexting’ was deemed simply experimental, with no adults involved and no indication or malice, exploitation or misuse. Research is required in Australia to better understand whether or not the prosecution of teenagers for sexting is an issue. It may very well turn out that discretionary factors mean the issue of prosecution for sexting is minor.

(2) The extent and effectiveness of existing awareness and education about the social and legal ramifications of sexting

Under NSW law, ‘sexters’ may be charged under the Crimes Act 1900 (NSW). The charges range from the production, dissemination and possession of child abuse material (s 91H(2)), to acts of indecency (s 61N), to the filming of private acts (s 91K). Under Victorian Law, the Crimes Act 1958 (Vic) ss 67A - 70AC have similar provisions criminalising sexting. On the federal level, they also fall under the Criminal Code 1995 (Cth) in regard to the use of carriage services for child abuse and child pornography material (ss 471.16 - 471.22), the procurement of persons under 16 (s 471.24) and the sending of indecent material (s 471.26). Additionally, registration for convicted sexters on Sex Offender Registers are possible in both Victoria (Sex Offenders Registration Act 2008) and NSW (Child Protection (Offender Registration) Act 2000).

1 Katherine Williams, Textbook on Criminology (Oxford University Press. 7th ed., 2012), 83.
2 For a summary of legal requirements throughout Australia, see Daryl Higgins et al, Mandatory reporting of child abuse and neglect (Australian Institute of Family Studies 2010).
As we understand it, there is limited awareness amongst children or the broader community regarding the potential criminal nature of sexting. Despite the lack of awareness, we do believe in the effectiveness of educative approaches. Such educative approaches are applicable both before and after the ‘offence’. When used before, educative programs can be relatively low cost and raise awareness about both the social and legal ramifications of sexting. Legal Aid NSW is currently developing an online website aimed at teenagers, designed to be interactive and educative regarding the relevant NSW law and the possible social ramifications of sexting. We believe this provides an educative resource in a format familiar to teenagers, in a way that seeks to involve them in a dialogue while at the same time meeting these educative requirements.

It should also be noted the potential role education and awareness in any considerations of sentencing in this area. In New Jersey and Pennsylvania, first-time sexters who are held not to have intended to commit a crime, and were also unaware that their actions were technically criminal, have the option of attending diversionary education programs in lieu of facing charges of child pornography possession and/or distribution. The major benefit of this option is that it directly addresses what may be considered the core issue - a failure to consider the potential of adverse consequences arising by teenagers. It may also help communicate to teenagers that it is not the act that is necessarily wrong, but the potential for exploitation and breach of privacy. It ought to also encourage an autonomous view of oneself rather than rely on the supervisory role of parents and the state in developing maturity. Best of all, it would reflect the spirit of the juvenile justice system (diverting children from crime through early intervention) and supplement the alternative juvenile justice schemes.

(3) The appropriateness and adequacy of existing laws

The existing Commonwealth and NSW law are currently blunt, indiscriminate and inappropriate.

There are a number of possible approaches to sexting. Obviously, the first is that any law regulating or criminalising it is a breach of children's rights to personal autonomy and sexual exploration. This approach has great merits, protecting the rights of young persons and allowing the law to concentrate on ‘genuine’ cases of child pornography. However of course, this approach ignores the fact that the creation, possession and transmission may in some instances warrant the involvement of the law.

The alternative extreme is to criminalise all sexting behaviour so as to ensure cases of sexting which are genuinely predatory and child pornography, are caught. This is the current legal approach. It is unwarranted and inappropriate.

Such an approach is blunt, and lacks the nuance necessary for accurately criminalising exploitative behaviour of this kind. It does send a clear message that such behaviour is perhaps ‘socially undesirable’ and discouraged by the law. In some instances, sexting behaviour is undesirable and inappropriate when it may lead to potentially harmful consequences. At the same time, some sexting behaviour is just a consensual expression of sexuality. To allow sexting behaviour of the second kind for consenting adults but deny it to children may be viewed as paternalistic.

A further problem with the current legal approach, is that even in the event that sexting behaviour should be discouraged, it is yet another step to say that the best way to discourage such behaviour is through serious criminalisation of children. Current legal approaches expose children to arguably some of the harshest sentencing regimes possible, including on occasion registration on Sex Offender Lists. We submit that a more appropriate, and a more legitimate sentencing structure should be found, one that is consistent with principles rehabilitation and harm minimisation.

To add to this, the current legal stance conflates a whole range of sexting behaviour under a single umbrella. The Paper asks us to draw a distinction between consensual sexting for private use between two persons, and between sexting where the image is disseminated more broadly than the person intended. While this division draws a relevant distinction, we would note that it could go further. The Paper should take account of the intentions behind further dissemination of an image. A further distinction must be drawn between genuine and predatory sexting offences by ‘young’ child pornographers, and between the further dissemination of photos by an ex-girlfriend/boyfriend that is exploitative and malicious, but not motivated by predatory behaviour. We believe that these nuanced distinctions are necessary, and that the law is inadequate until they are taken into account and treated separately.

Law Reform Options

To be complete, the inquiry should also address questions of age. For example, it is worth noting the interplay of laws regarding the valid consent of children to have sexual intercourse. In the majority of Australian jurisdictions, this age is 16. It is perhaps inconsistent then that sexual intercourse between two sixteen-year-olds is permitted but the comparatively innocent act of taking a naked image could expose them to prosecution as child pornographers and registration with the Sex Offenders Register.

The inquiry should also begin considering at this early stage any options for law reform it may later pursue. We raise two such options below, which also help illustrate the issues and complexities addressed above.

A Affirmative defence

An affirmative defence or exclusion of sexting from prosecution is ideal. It would hopefully provide adequate protection for children, and better focus the legislation on the more significant problem of child pornography and abuse material. However, the precise form and wording of such a defensive provision would have to be nuanced enough to
distinguish between cases of sexting and cases that resemble sexting but can better be described as child pornography due to factors such as abuse, exploitation or coercion.

Options include an affirmative defence if the communication is a ‘sext’, where ‘sext’ is defined by reference to the age, intention, use and consensual nature of the communication. It would have to exclude situations where abuse, exploitation or coercion are present. Alternatively, a list of considerations to take into account in the finding of a conviction if the person being prosecuted is below a certain age (such as 21). Considerations would again include reference to the age gap between the parties, the intentions, use and presence of consent. This would not be an explicit defence and so may better capture situations where the sext is genuinely an instance of child pornography. Yet a further option may be a requirement that if the defence raises on the balance of probabilities evidence that the communication was a sext (where ‘sext’ is defined by the legislation), that the prosecution then have the onus to prove extra elements of abuse, exploitation or coercion existed such that the relevance of the act being a sext is minimal.

However, the most effective and straightforward option would be the first option, providing an explicit and definitive defence. It is suggested that if this was to be a course chosen, then the Crimes Act 1958 (Vic) ss 68, 69, 70 could be altered to add to the list of excepted persons those children that may be simply sexting. The change would read similarly to what follows:

"(2) Nothing in subsection (1) makes it an offence for -

(a) any member or officer of a law enforcement agency; or
(b) a person authorised in writing by the Chief Commissioner of Police assisting a member or officer; or
(c) a person belonging to a class of persons authorised in writing by the Chief Commissioner of Police assisting a member or officer; or
(d) a person below the age of 18, in the absence of any evidence of abuse, exploitation or coercion,

to print or otherwise make or produce child pornography, where for (a), (b) or (c), this must be in the exercise or performance of a power, function or duty conferred or imposed in the member or officer by or under this or any other Act or at common law".

As this list demonstrates, the options for providing statutory defence mechanisms are broad. As a positive, they are a strong option for preventing the criminalisation of innocent acts.

B Diversionary Education Programs

In New Jersey and Pennsylvania, first-time sexters who are held not to have intended to commit a crime, and were also unaware that their actions were technically criminal, have the option of attending diversionary education programs in lieu of facing charges of child pornography possession and/or distribution.5

The major benefit of this option is that it directly addresses the fundamental issue behind teenage sexting activity, i.e., a failure to consider the potentially adverse consequences. By participating in this program, teenagers may better comprehend the rationale behind discouraging sexting — that it is not simply a case of adults being killjoys, but rather a wise decision to protect oneself from exploitation and show respect for others’ privacy. It provides a valuable step towards developing responsible autonomy, rather than relying on constant supervision by parents and teachers. This approach would also reflect the spirit of the NSW juvenile justice system (diverting children from crime through early intervention) and supplement the alternative scheme established by the Young Offenders Act 1997 (NSW).

There has been some contention in the US over the validity of making such programs mandatory. This is because forcing teenagers to participate is said to infringe their First Amendment right to freedom of speech. This would probably be less of an issue in Australia since the only guaranteed freedom of speech is in relation to political communication, and sexting hardly fits that description. Nonetheless, out of abundant caution, it would probably be best for such programs to be made optional.

C ‘Romeo and Juliet’ Laws

This option focuses on the relative ages of teenage sexters. Modelled on an exception to liability under US statutory rape laws, the introduction of a ‘Romeo and Juliet’ provision would mean that if the older participant is only a few years older than the younger (the age difference varies between states), then neither would be criminally liable as a result of their sexting activity. In some cases, the age range may extend to include teenagers who are adults at law (that is, 18- and 19-year-olds). As Arcabascio notes, this reflects the reality that ‘no magic “adult” switch goes off when people turn 18’. Such an approach helps to avoid absurdities, e.g., where a teenage couple’s private ongoing sexting activity is suddenly illegal on the older partner’s 18th birthday.

The main risk, however, is that by relying solely on the criterion of age, ‘Romeo and Juliet’ laws may overly decriminalise teenage sexting, such that malicious or harmful cases (e.g. forwarding a sext sent in confidence to many peers out of spite) might not face due consequences. This possibility needs to be safeguarded against, eg, by requiring proof that the sexting was consensual before teenagers can have the benefit of this legislative protection. Additionally, this option narrows the scope of liability but does not itself work towards reducing the incidence of sexting among teenagers. An educational element needs to be added to make this option more complete.

Conclusion

In summary, CLS believes it is not in a position to comment on the current incidence of sexting in Victoria, but does cautiously note the role of discretion in reporting.

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9 Arcabascio, above n 17, 35.
Similarly, CLS can only comment on the issue of awareness and education in NSW. However in doing so, we do confirm that sexting is an increasing issue in the criminal justice system, and that education is being developed as a tool to raise community awareness and should also be considered as a reform option.

Lastly, CLS is of the strong opinion that the current legal regime in Victoria, with its strong similarity to the NSW system, is inadequate and inappropriate. The criminalisation of all sexting behaviour and equation of sexting with child pornography, together with the harsh sentencing options associated with this scheme such as Sex Offender Registration, do little to protect the rights of children and are in fact counter to them. The law needs to take a more nuanced approach. The exploitative and malicious dissemination of sexts without consent to third parties to a relationship, along with genuine instances of child pornography by predatory children, are the only two instances that ought to be criminalised. However, they should not be criminalised together, but treated as separate offences based on the manifestly different motivations behind each.

Legal Aid NSW thanks you for the opportunity to comment. We would welcome any invitation to expand upon this or any subsequent submission in relation to the issues raised. If you have any questions in relation to the matters raised in this submission, please feel free to contact:

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Yours faithfully,

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